NO. 79-6015

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

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SUPREME COURT, U.S.

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MARVIN RAY ROBERTSON, APPELLANT

VS.

THE STATE OF TEXAS, APPELLEE

* * * * * *

APPEAL FROM THE
COURT OF CRIMINAL APPEALS OF TEXAS
JURISDICTIONAL STATEMENT

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APPEAL FROM THE
COURT OF CRIMINAL APPEALS OF TEXAS

THE OPINIONS BELOW

The Per Curiam opinion of Panel 1 of the Court of Criminal Appeals of Texas was unpublished, but reported at 586 S.W. 2d 877, A copy of the decision, served on counsel, is attached as Appendix A. The Motion for Rehearing, En banc, was denied without opinion.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

(i) This is a criminal prosecution against the appellant, Marvin Ray Robertson. Appellant was charged and convicted in the Criminal District Court of Dallas County, Texas, of aggravated robbery in violation of Section 29.03 of the Texas Penal Code. At the punishment stage of the trial, the jury was requested to find whether appellant had been previously convicted of two other felonies. Having found in the affirmative, appellant was sentenced to life imprisonment under Section 12.42(d) of the Texas Penal Code. Appellant contended Section 12.42(d) is invalid because actions under it are prohibited by the Eighth and Fourteenth Amendments to the Constitution of The United States. The decision of the Court of Criminal Appeals of Texas was in favor of the validity of Section 12.42(d).

(ii) The judgment, or decree, sought to be reviewed is the ruling of Panel 1 of the Court of Criminal Appeals of Texas delivered September 19, 1979. A Motion for Rehearing En banc was denied on October 31, 1979. The Notice of Appeal was submitted to the Court of Criminal Appeals of Texas on January 24, 1980.

(iii) Jurisdiction of the appeal is conferred on this Court by Title 28 of the United States Code, Section 1257(2).

(iv) Cases sustaining the jurisdiction of this Court are:

> Gardner v. Florida, 97 S. Ct. 1197, 430 U.S. 349;
> Cohen v. California, 91 S. Ct. 1780, 403 U.S. 15;
> Bantam Books, Inc. v. Sullivan, 83 S. Ct. 631, 372 U.S. 58

(v) The validity of the procedures under Section 12.42(d) of the Texas Penal Code is here involved. The full text of that Section is as follows:

> "If it be shown on the trial of any felony offense that the defendant has previously been finally convicted of two felony offenses, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction he shall be punished by confinement in the Texas Department of Corrections for life."

QUESTION PRESENTED BY THE APPEAL

The following question is presented by this appeal: Do the sentencing procedures requiring a life sentence under the habitual felony statute of the State of Texas violate due process and result in cruel and unusual punishment as forbidden by Eighth and Fourteenth Amendments to the United States Constitution?

STATEMENT OF THE FACTS OF THE CASE

On May 18, 1977, Mike Howell was working as the Manager in an auto parts store when, at approximately 4:00 o'clock p.m., a black male entered the store; he asked the salesman for a fuse for his air conditioner or radio, and asked Howell for a radiator hose. As Howell was looking up the type of hose in the catalogue, the robber pulled a hand gun and told him to move away from the counter. The robber then demanded the hand gun behind the counter and all the money. Howell gave him the gun in a holster and put approximately $350.00 in a sack.

On May 25, 1977, appellant was arrested by the Dallas Police Department and charged with aggravated robbery. Appellant entered a plea of Not Guilty, and requested a jury trial on all issues including guilt and punishment.

On the 16th and 17th of August, 1977, appellant was tried and convicted by a jury on his plea of Not Guilty to the offense of aggravated robbery. At the punishment stage of the trial, the State alleged appellant had been convicted twice before of felony offenses. To these charges appellant plead Not True. By fingerprint analysis appellant was identified as an individual who had been convicted of two felony offenses. Appellant offered no testimony. At the conclusion of the punishment stage of the trial, the jury was instructed if they found appellant had, in fact, been convicted twice before of felony offenses, they would cease deliberations and return that verdict into Court. The jury found the allegations of two prior felony convictions to be true. Thereafter, the Court assessed the punishment of appellant at life imprisonment in the Texas Department of Corrections. During the punishment stage of the trial, appellant was directed by the Court not to disclose to the jury the effect of their findings regarding prior felony convictions.

On August 31, 1977, appellant gave Notice of Appeal to the Court of Criminal Appeals of Texas. The case was heard by the Court of Criminal Appeals on April 10, 1979. In a decision of Panel 1, delivered September 19, 1979, the conviction of appellant was affirmed. The Court of Criminal Appeals specifically rejected the contention of appellant that the sentencing procedures used at his trial, which resulted in imposition of a life sentence, were violative of due process and, thus, constituted cruel and unusual punishment in violation of the Constitution of the United States. Appellant timely filed a Motion for Rehearing, En banc, which was denied October 31, 1979.

THE FEDERAL QUESTION PRESENTED IS SUBSTANTIAL

The question presented by this appeal is whether a State Court, in its sentencing procedures, can disregard the statutory obligation of individualized sentencing and, thus, violate appellant's right of

due process to the extent the sentence imposed constitutes cruel and unusual punishment. In Lockett v. Ohio, 98 S. Ct. 2954, 438 U.S. 586, this Court recognized the right to individualized sentences in non-capital cases rests on public policy enacted into statute and not constitutional commands. The State of Texas has a public policy which mandates individualized sentences. Specifically, Section 1.02(3) of the Texas Penal Code states one objective is "to prescribe penalties that are proportionate to the seriousness of the offenses and permit recognition of differences of rehabilitation possibilities among individual offenders." This objective and policy has been recognized by the Court of Criminal Appeals of Texas in Jurek v. State, 522 S.W. 2d 934 (1975). Amplifying, in Jurek, it was held:

> "Some discretion is inherent and desirable in any system of justice, from arrest to final judgment. . . . To eliminate all discretion on the part of the jury would be to risk elimination of that valuable element which permits individualization based on consideration of all extenuating circumstances and would eliminate the element of mercy, one of the fundamental traditions of our system of criminal jurisprudence." Id. at 940

Having recognized the right to individualized sentencing, it follows the procedures used must afford a defendant the right to meaningfully participate at the punishment stage of the trial.

This statutory right means a defendant can only be assessed a "mandatory" life sentence after the jury has considered all the factors surrounding both the particular offense and the individual defendant. Otherwise, there is no effective way a defendant can seek the mercy which the State of Texas has provided for by statute.

As pointed out in Gardner v. Florida, 430 U.S. 349, 358; 97 S. Ct. 1197, 1204 (1977):

> ". . . it is now clear that the sentencing process, . . ., must satisfy the requirements of the due process clause. . . . The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process."

This is exactly the situation presented by this appeal. The trial Court's action precluded appellant from presenting any evidence in mitigation of his sentence. As in capital cases, a life sentence may

be imposed automatically, but only after the jury considers all relevant factors. Appellant was precluded from having these factors considered by the instructions of the trial court during the trial as well as the instructions given to the jury. Significantly, it is only in situations where the State seeks punishment under Texas Penal Code Section 12.42(d) that a defendant's rights are infringed. All other sentencing statutes, both capital and non-capital, provide for individualized sentencing.

This right to present evidence in mitigation of the allegations made by the State was clearly recognized by this Court in Pennsylvania v. Ashe, 302 U.S. 51; 58 S. Ct. 59, when it stated:

> "For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender." 302 U.S. at 55, 58 S. Ct. at 61. (Emphasis added)

The State of Texas has recognized this requirement in every situation except those arising under Section 12.42(d). All other non-capital sentencing statutes provide for individualized sentences. The capital sentencing statute specifically requires it. Only the statute applied to appellant prevents consideration of mitigating factors.

Even though the right to individualized sentencing is one created by State statute, rather than Constitutional provision, it is still one which comes within the due process protection of the Fourteenth Amendment. Otherwise, the right would be meaningless. Further, creating a right to individualized sentencing and then preventing appellant from effectively exercising that right, constitutes cruel and unusual punishment in violation of the Eighth Amendment of the U. S. Constitution. As this Court held in Jurek v. Texas, 428 U.S. 262, 271; 96 S. Ct. 2950, 2956:

> ". . . a sentencing system that allowed the jury to consider only aggravating circumstances would almost certainly fall short of providing the individualized sentencing determination that we today have held . . . to be required by the Eighth and Fourteenth Amendments."

While the foundation of, or the right to, individualized sentencing may be either a particular State statute or a Constitutional command;

once established, it is entitled to the protection of due process in any and all circumstances.

There can be no doubt appellant was denied the right to meaningfully participate in the sentencing procedure. First, the District Attorney filed a motion which was granted by the trial court preventing appellant's attorney from informing the jury as to the effect of its verdict. (Record, p. 20) Appellant's attorney was also instructed he could not give the jury any information not contained in the Court's charge. (Transcript, p. 104) The instructions to the jury were to only consider whether appellant had been twice before convicted of felonies. (Record, p. 34) Thus, there was no opportunity to present any mitigating evidence. Only aggravating circumstances were considered. Ultimately, the only facts considered were prior convictions. Simply stated, appellant could not participate at all at the sentencing hearing.

CONCLUSION

The State of Texas has established a right to individualized sentences for criminal defendants. However, defendants, such as Appellant, who are prosecuted under the habitual felony statute, are denied this right. Therefore, the procedures followed by the State of Texas under Texas Penal Code Section 12.42(d) violate Appellant's right to due process and the result constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. For these reasons, this statute must be held invalid.

Respectfully submitted,

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MARVIN RAY ROBERTSON, Appellant

NO. 57,555 v. - - - Appeal from DALLAS County

THE STATE OF TEXAS, Appellee

O P I N I O N

This appeal follows conviction for the offense of aggravated robbery. Appellant, having been tried on an indictment enhanced according to the provisions of V.T.C.A. Penal Code, Section 12.42(d), was sentenced to life confinement.

On May 18, 1977, Mike Howell was working as the manager of Indy Auto Parts Store when at approximately 4:00 p.m. appellant entered the store; he asked a salesman for a fuse for his air conditioner or radio and asked Howell for a radiator hose. As Howell was looking up the type of hose in a catalogue, appellant pulled a handgun and told him to move away from the counter. Appellant then demanded the handgun behind the counter and all the money. Howell gave appellant the gun in a holster and put approximately $350.00 in a sack. Appellant fled from the store and was thereafter apprehended on May 25, 1977.

Appellant first contends that the trial court erred in denying his motion to strike "the unconstitutional enhancement paragraphs" of the indictment. Appellant's contention is that because of the mandatory operation of Section 12.42(d), supra, he has been denied the opportunity to have a jury assess his punishment. Appellant further alleges that his prevention from presenting evidence to the jury concerning the effect of its verdict or facts and circumstances which might mitigate the sentence to be imposed, constitutes a denial of due process

APPENDIX A

of law under the Fourteenth Amendment to the United States Constitution.

These contentions have been repeatedly rejected and are here likewise overruled. Spencer v. Texas, 385 U.S. 554, 87 S.Ct. 648, 17 L.Ed.2d 606 (1967); McCardell v. State, 557 S.W.2d 289 (Tex.Cr.App. 1977); Passmore v. State, 544 S.W.2d 399 (Tex.Cr.App. 1976); Schultz v. State, 510 S.W.2d 940 (Tex.Cr.App. 1974); Mullins v. State, 409 S.W.2d 869 (Tex.Cr.App. 1966).

By his second ground of error, appellant contends that the trial court erred in denying his motion to suppress a written statement made by appellant to the arresting officers in which he confessed his guilt to the offense. Appellant's complaint is grounded on the assertion that the statement was made at a time when he could not knowingly and intelligently waive his rights under Art. 38.22, V.A.C.C.P. because he was under the influence of heroin.

The record reflects that appellant took the stand in his own behalf at the guilt-innocence stage of trial on the merits and there made a judicial confession to commission of the instant offense. We therefore do not reach the merits of appellant's second complaint; error attending the trial court's admission of the written statement, if any, would be, by appellant's admission, rendered harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Ground of error two is without merit.

In his third ground of error, appellant contends

the trial court erred in denying his requested charge on insanity. Appellant asserts that there was evidence before the jury that he was a heroin addict, and that this raised an issue of temporary insanity at the time of the offense. The State contends, and we agree that the record reflects, that the evidence introduced by appellant does not raise the issue of insanity as a defense because his use of heroin was voluntary.

In Hanks v. State, 542 S.W.2d 413, 416 (Tex.Cr.App. 1976), this Court held that "voluntary intoxication from liquor or drugs. . . is not a defense. . ." to the commission of an offense. See V.T.C.A. Penal Code, Section 8.04(a) and (c). The trial court properly refused appellant's requested jury instruction and this ground of error is overruled.

The judgment of conviction is affirmed.

PER CURIAM

(Delivered September 19, 1979)

BY: Panel 1, 2nd Quarter, 1979, composed of:

John F. Onion, Jr., Presiding Judge
Truman E. Roberts, Judge
Sam Houston Clinton, Judge

NO. 57,555

JAN 31 1980

OFFICE OF THE CLERK
SUPREME COURT, U.S.

MARVIN RAY ROBERTSON, Appellant,	I	IN THE COURT OF
V.	I	CRIMINAL APPEALS
THE STATE OF TEXAS, Appellee.	I	OF T E X A S.

NOTICE OF APPEAL TO
THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that MARVIN RAY ROBERTSON, the appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Court of Criminal Appeals of Texas affirming the judgment of conviction, entered herein on October 31, 1979.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

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A/C 214 742-9175

CERTIFICATE OF SERVICE

I hereby certify I have served a copy of the foregoing Notice of Appeal on the Clerk of the Court of Criminal Appeals of Texas, by first class mail, postage prepaid, this 24th day of January, 1980.

Barry J. Brooks

RECEIVED IN
COURT OF CRIMINAL APPEALS
JUL 25 1980
Thomas Lowe, Clerk